No. 16183

United States
Court of Appeals
for the Ninth Circuit

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—1-7-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco, California,

Attorney for Petitioner.

CHARLES K. RICE,
Assistant U. S. Attorney General,

LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.,

Attorneys for Respondent.

The Tax Court of the United States

Docket No. 61127

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency Ap:SF:AA:LT 90-D:RSG dated December 12, 1955, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual with residence at 1238 Pacific Avenue, San Francisco 9, California. The returns for the period here involved were filed with the Collector for the District of San Francisco, California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioner on December 12, 1955.

3. The deficiencies (or liabilities) as determined by the Commissioner, are in claimed penalties for the calendar years 1952 and 1953, in the amount of $1,416.02, of which the entire amount is in dispute.

4. The determination of penalty set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in finding that no reasonable cause has been shown for failure to file estimated tax returns for the years 1952 or 1953;

(b) The Commissioner erred in holding that he can assess penalties for alleged substantial underestimation, which was in fact, failure to file estimated tax returns, as set forth in (a) above, and which failure to file was brought about by the acts and delay of the Commissioner of Internal Revenue himself; and erred in failing to hold that assessment of penalties under such circumstances and for such reasons is taking property without due process of law in violation of the Fifth Amendment to the United States Constitution;

(c) The Commissioner of Internal Revenue erred in holding that where no estimated tax return has been filed, the penalty for "substantial overestimation" is cumulative to the penalty for failure to file, or can exist independently of the latter (i.e., where good cause has been shown) and further erred in failing to hold that the Internal Revenue Bureau regulation allowing such cumulation (Supplement to Regulations 111, sec. 29, 294-1(b)(3)(A), p. 438) is invalid as inconsistent with the language of 26 USCA 294, as it existed previous to 1954.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

When estimated tax returns were first introduced in 1943, petitioner understood the law to be that an estimated tax return had to be filed under all

circumstances, and filed same. The following year (1944) petitioner understood that the law had again been changed to make it optional whether to file estimated tax returns and pay thereon or to file Form 1040 and pay thereon. From and including 1944 to and including 1953 petitioner filed only Form 1040 each year. Each of these returns showed on its face that no payment of estimated tax had been made. The penalties now claimed are for the ninth and tenth years of this ten-year period (1944-1953). The Commissioner of Internal Revenue never made any objection to the filing and payment of tax on Form 1040 alone, and to the nonfiling of estimated tax returns. Objections to or revision of petitioner's tax returns during this period were, however, made in other respects, as set forth in Exhibit "B" hereto attached.

In the year 1946 petitioner's return included a fee apportioned back over a ten-year period; no claim was made that any estimated tax returns should have been filed.

In the year 1950 petitioner's return included a fee apportioned back over a four-year period; no claim was made that any estimated tax returns should have been filed.

After assessment of claimed penalties by the Internal Revenue Agent, petitioner filed a timely protest. A full, true and correct copy of said protest is hereto attached and marked Exhibit "B", and incorporated in this petition and made a part thereof. There has been added to the text of said

protest the correct citation of Delaney vs. U. S., 199 F. 2d 107, and the citation of Jones vs. U. S., 226 F. 2d 24.

Thereafter, on or about November 7, 1955, petitioner had a conference with R. S. Gilmore, Technical Advisor of the Appellate Division, San Francisco Region. Salient features of said conference are set forth in Exhibit "C" attached hereto and made a part of this petition as fully as if set forth herein.

Wherefore, petitioner prays that this Court may hear the proceedings and set aside the claimed deficiency in toto.

Respectfully submitted,

/s/ GEORGE OLSHAUSEN,
In propria persona.

Duly Verified.

EXHIBIT "A"

STATEMENT

Ap:SF:AA:LT 90-D:RSG
Mr. George G. Olshausen
1238 Pacific Sreet
San Francisco, California

Tax Liability for the Taxable Years Ended December 31, 1952, and December 31, 1953

	Additions to Tax	
Year	Section 294(d)(1)(A)	Section 294 (d) (2)
1952 Income Tax Penalties	$734.87	$489.92
1953 Income Tax Penalties	114.73	76.50
Total	$849.60	$566.42

Exhibit "A"—(Continued)

You did not file Declarations of Estimated Tax, nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by Section 294(d)(1)(A) and Section 294(d)(2), Internal Revenue Code (1939), for the taxable years 1952 and 1953.

In making this determination of your income tax liability, careful consideration has been given to your protest dated October 6, 1955.

Year: 1952

Adjustments to Income

Net income as shown on the return—unchanged	$11,277.05

Computation of Income Tax

Tax liability as shown on the return Account No. AP 5210, San Francisco District—unchanged	$ 8,165.26
Deficiency (Overassessment) in income tax	None

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax Under Section 294(d)(2) of the Internal Revenue Code

(a) Corrected Tax		$ 8,165.26
80% of Above (66-2/3 if farmer)		6,532.21
Less: Withholding Tax Actually Withheld	None	
Estimated Tax	None	—0—
Tentative Addition to Tax		$ 6,532.21
(b) Corrected Tax		$ 8,165.26
Less: Withholding Tax Actually Withheld	None	
Estimated Tax	None	—0—
Difference		$ 8,165.26
Tentative Addition to Tax (6% of above balance)		$ 489.92
Addition to Tax:		
Tentative (a) or (b), whichever is the lesser		$ 489.92

Failure to File a Declaration of Estimated Tax on Time Section 294(d)(1)(A)

Corrected Tax		$ 8,165.26
Less: Withholding Tax Actually Withheld	None	
Overpayment credit, if any, from a prior year	None	—0—
Balance to be divided into 4 installments due		$ 8,165.26

Exhibit "A"—(Continued)

Year: 1952—(Continued)

Amount Due	Installment Due Date	Date Paid	Addition for First Month Unpaid	1% for Each Additional Month or Fraction	Not More Than 10% Assessable
$ 2,041.31	3-15-52	3-15-53	5%	5%	$ 204.13
2,041.31	6-15-52	3-15-53	5%	5%	204.13
2,041.32	9-15-52	3-15-53	5%	5%	204.13
2,041.32	1-15-53	3-15-53	5%	1%	122.48
$ 8,165.26			Addition to Tax		$ 734.87

Year: 1953

Adjustments to Income

Net income as shown on the return—unchanged..... $ 5,768.76

Computation of Income Tax

Tax liability as shown on the return Account No. OP 35226, San Francisco District—unchanged..... $ 1,274.94

Deficiency (Overassessment) in income tax..... None

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax Under Section 294(d)(2) of the Internal Revenue Code

(a) Corrected Tax ..... $ 1,274.94

80% of Above (66-2/3% if farmer)..... $ 1,019.95

Less: Withholding Tax Actually Withheld....None

Less: Estimated Tax .....None —0—

Tentative Addition to Tax..... $ 1,019.95

(b) Corrected Tax ..... $ 1,274.94

Less: Withholding Tax Actually Withheld....None

Less: Estimated Tax .....None —0—

Difference ..... $ 1,274.94

Tentative Addition to Tax (6% of above balance) $ 76.50

Addition to Tax:

Tentative (a) or (b), whichever is the lesser.... $ 76.50

Failure to File a Declaration of Estimated Tax on Time Section 294(d)(1)(A)

Corrected Tax ..... $ 1,274.94

Exhibit "A"—(Continued)

Year: 1953—(Continued)

Less: Withholding Tax Actually Withheld.....None

Less: Overpayment credit, if any, from a prior year .....None —0—

Balance to be divided into 4 installments due $ 1,274.94

Amount Due	Installment Due Date	Date Paid	Addition for First Month Unpaid	1% for Each Additional Month or Fraction	Not More Than 10% Assessable
$ 318.73	3-15-53	3-15-54	5%	5%	$ 31.87
318.73	6-15-53	3-15-54	5%	5%	31.87
318.74	9-15-53	3-15-54	5%	5%	31.87
318.74	1-15-54	3-15-54	5%	1%	19.12
$ 1,274.94			Addition to Tax		$ 114.73

Served February 28, 1956.

[Endorsed]: T.C.U.S. Filed February 24, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegation contained in paragraph 1 of the petition.

2. Admits the allegation contained in paragraph 2 of the petition.

3. Admits the allegation contained in paragraph 3 of the petition.

4. (a) to (c), inclusive. Denies the Commissioner erred as alleged in sub-paragraphs (a) to (c), inclusive, of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service, Room 1067, 870 Market Street, San Francisco, California.

Served April 12, 1956.

[Endorsed]: T.C.U.S. Filed April 11, 1956.

EXHIBIT "A"

[Title of Tax Court and Cause.]

PROPOSED AMENDMENT TO PETITION

The determination of penalty set forth in the Notice of Deficiency is based upon the following errors in addition to those set forth in subdivision 4, pages 2 and 3 of the original Petition:

(d) The Commissioner of Internal Revenue erred in holding that there was a failure to pay installments of estimated tax declared or undeclared; and in failing to find the contrary;

(e) The Commissioner of Internal Revenue erred in failing to find that the notice of the requirement of filing both Form 1040 and the Estimated Tax Return, given by the Instructions Pamphlet was inadequate and known to be inadequate to the District Director of the San Francisco District and to the Commissioner of Internal Revenue;

(f) The Commissioner of Internal Revenue erred in failing to find that the notice of requirement of filing both Form 1040 and the Estimated Tax Return was inadequate even after the Instructions Pamphlet had been supplemented by a newspaper advertisement.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 13, 1956.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, and for answer to the amendment to the petition filed on December 13, 1956, by the above-named petitioner, denies as follows:

4. (d) to (f), inclusive. Denies the Commissioner erred as alleged in paragraphs (d) to (f), inclusive, of the amendment to subdivision 4 of the original petition.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES, CWN,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney.

Served and Entered January 7, 1957.

[Endorsed]: T.C.U.S. Filed January 4, 1957.

EXHIBIT "B"

[Title of Tax Court and Cause.]

PROPOSED SECOND AMENDMENT TO PETITION

The determination of penalty set forth in the notice of Deficiency is based upon the following error in addition to those set forth in the original petition and in the subsequent amendment thereto:

(g) The Commissioner of Internal Revenue erred in failing to find that he was barred by laches from levying or collecting the penalties or any of them

set forth in the deficiency notice attached as Exhibit "A" to the original petition.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Duly Verified.

Served and Entered May 10, 1957.

[Endorsed]: T.C.U.S. Filed May 8, 1957.

[Title of Tax Court and Cause.]

ANSWER TO SECOND AMENDMENT TO PETITION

The Respondent, in answer to the proposed second amendment to the petition filed in the above-entitled case, denies as follows:

(g) Denies the Commissioner erred as alleged in the unnumbered first paragraph of the petition as amended, and in subparagraph (g) thereunder.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service.

Served and Entered June 7, 1957.

[Endorsed]: T.C.U.S. Filed June 3, 1957.

EXHIBIT "A"

[Title of Tax Court and Cause.]

PROPOSED THIRD AMENDMENT TO PETITION

The determination of penalty set forth in the notice of deficiency is based upon the following errors in addition to those set forth in the original petition and in the subsequent amendments thereto:

(h) The Commissioner of Internal Revenue erred in issuing a deficiency notice at all, and erred in holding that the present case falls within the deficiency notice procedure;

(i) The Commissioner of Internal Revenue erred in failing to hold that a deficiency notice in the present case violates petitioner's constitutional rights in each of the following respects:

First: It denies the right of trial by jury in violation of the VIth Amendment to the United States Constitution, where the amounts claimed are criminal penalties, and in violation of the VIIth Amendment to the United States Constitution where the amounts claimed are civil penalties or interest;

Second: The deficiency notice, being an executive determination of liability on the ground of alleged fault, is a denial of due process of law in violation of the Vth Amendment to the United States Constitution, and in effect a bill of attainder (an "executive bill of attainder") in violation of Art. I,

Exhibit "A"—Continued

sec. 9, cl. 3, of the United States Constitution so far as the amounts claimed are criminal penalties.

Third: The inverted burden of proof, provided by Tax Court Rule No. 32 is a denial of due process of law in violation of the Vth Amendment to the United States Constitution, under the rule of cases like W & A Ry. v. Henderson, 279 US 639, and Tot v. U.S., 319 U.S. 463.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Served and Entered July 23, 1957.

[Endorsed]: T.C.U.S. Filed June 22, 1957.

[Title of Tax Court and Cause.]

ANSWER TO THIRD AMENDMENT TO PETITION

The Respondent, in answer to the proposed third amendment to the petition filed in the above-entitled case, denies as follows:

(h) Denies the allegations of error contained in paragraph (h) of the proposed third amendment to petition.

(i) First, Second, and Third. Denies the allegations of error contained in subparagraphs First through Third of paragraph (i) of the proposed third amendment to petition.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service.

Served and Entered August 8, 1957.

[Endorsed]: T.C.U.S. Filed August 6, 1957.

[Title of Tax Court and Cause.]

CONDITIONAL DEMAND FOR JURY TRIAL

In the event that the defense in the Third Amendment to Petition is not sustained, Petitioner hereby demands a jury on the trial of the above entitled action upon all issues other than said Third Amendment.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Served and Entered August 29, 1957.

[Endorsed]: T.C.U.S. Filed August 26, 1957.

[Title of Tax Court and Cause.]

STIPULATION AS TO FACTS

It is stipulated that the following facts may be received in evidence without further proof: pro-

vided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated: and provided, further, that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. Petitioner is an individual, residing in San Francisco, California, who has at all times herein mentioned filed individual income tax returns at the San Francisco, California office of the Commissioner of Internal Revenue;

2. Petitioner has at all times personally prepared his own income tax returns, without assistance;

3. From and including 1944 to and including 1953 petitioner filed only Form 1040 each year;

4. Each of these returns showed on its face that no payment of estimated tax had been made;

5. In the year 1946 petitioner's return included a fee apportioned back over a ten-year period. Petitioner did not declare and file estimated income tax returns for said year nor did the Commissioner of Internal Revenue object to this procedure;

6. In the year 1950 petitioner's return included a fee apportioned back over a four-year period. Petitioner did not declare and file estimated income tax returns for said year nor did the Commissioner of Internal Revenue object to this procedure;

7. All forms 1040 for past years, and all instruc-

tion pamphlets accompanying Form 1040 for past years are to be admitted in evidence without objection of respondent;

8. Letter of April 12, 1957, from U. S. Treasury Department to George Olshausen, signed by K. W. Johnson is to be admitted in evidence without objection of respondent;

9. At all times herein mentioned James Fung was and is an internal revenue agent; Ross R. Barkley was and is a group chief of Internal Revenue service; Robert S. Gilmore was and is a technical advisor of Internal Revenue service.

/s/ GEORGE OLSHAUSEN,
Petitioner.

/s/ NELSON P. ROSE,
Attorney, Internal Revenue Service, Chief Counsel, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed October 3, 1957.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Customs Courtroom 421, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California. Thursday, October 3, 1957.

(Met, pursuant to call of the calendar, at 2:00 o'clock p.m.)

Before: Honorable Clarence P. Le Mire, Judge.

Appearances: George Olshausen, 1238 Pacific

Avenue, San Francisco, California, appearing for the Petitioner. Leslie Jones and T. M. Mather, (Honorable Nelson P. Rose, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1]*

Proceedings

The Court: You may call the case, Mr. Clerk.

The Clerk: Docket 61127, George Olshausen.

State your appearances.

Mr. Jones: Leslie Jones and T. M. Mather for the Respondent.

Mr. Olshausen: And the Petitioner appears in propria persona. I am both the Petitioner and the Attorney of record.

The Court: Very well, sir.

Mr. Olshausen: I will first make an opening statement in this matter.

The Court: Before we start, I have looked through these files. I don't see the 90-day letter and computations attached. If you can find it in this file, I wish you would.

Mr. Olshausen: A copy was attached to the petition.

The Court: Oh, I see. Well, I didn't find any date on that.

Mr. Jones: The first page, I don't think was—I will take a look.

The Court: There doesn't appear to be any date on it.

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* Page numbers appearing at top of page of Reporter's Transcript of Proceedings.

Mr. Jones: December 12, 1955, your Honor. [2]

The Court: Is that omitted on this copy? Where should that appear on this copy that is here. This should be an extra copy.

Do you have the 90-day letter in your file?

Mr. Olshausen: Yes, I think I have the original in here.

The Court: If you don't mind, I would prefer that you would introduce in evidence that 90-day letter.

Mr. Olshausen: The original 90-day letter?

The Court: Yes.

Mr. Olshausen: I will have to go through this file to find it. It is not one of the papers I had on top to introduce in evidence, but I can go through the file during the recess or whenever it is convenient to the Court. I do have the original 90-day letter here.

The Court: Well, you don't mind introducing it in evidence, do you?

Mr. Olshausen: No, no.

The Court: Very well. If you locate that after the hearing, you can put it in as your Exhibit No. 1. I suppose we would have to call it Exhibit No. 1.

Mr. Olshausen: That's all right.

The Court: Is that satisfactory to you gentlemen?

Mr. Jones: Yes. [3]

The Court: The 90-day letter with computation attached——

Mr. Olshausen: Yes.

The Court: ——will be offered as Petitioner's Exhibit 1.

Mr. Olshausen: Yes.

The Court: And you will hand that to the Clerk?

Mr. Olshausen: Yes. I think at present a copy of the 90-day letter is attached to the petition, and for practical information it is before the Court that way; and, at least, the computation is, and that's one of the legal issues in this case.

(Petitioner's Exhibit No. 1 was marked for identification and received in evidence.)

Opening Statement on Behalf of the Petitioner

Mr. Olshausen: As I say, I will make this opening statement to outline what the issues are.

This case is one that does not involve a tax deficiency. It deals solely with what the statute calls additions to the tax in Section 194 of the 1939 Revenue Act; namely, what was the 60—Section 294 in the Section, internal revenue, of the 1939 Code.

The 90-day letter and the computation calls it a penalty. Now, the correct term for that is something that may or may not come up in the course of the hearing. I just [4] want to say the position that we will develop will be the same whether it is called a penalty or something else.

The Court: Very well.

Mr. Olshausen: Our first point is that inasmuch as there is no claim for any tax deficiency, the procedure by a deficiency notice and the 90-day letter does not apply and that it applies neither under the terms of the 1939 Act nor, as far as this goes, which would be considered a procedural matter under the terms of the 1954 Act.

In other words, the first objection is that the government is mistaken in its remedy. What its remedy is I am not here to say, but it will presumably be an action in the District Court, and before even approaching the issues of the fact, our position is that judgment must go for the Petitioner on the grounds of the insufficiency of facts alleged in the deficiency notice; that, as I say, the deficiency is not competent under the statute to fix liability in the absence of a claim of deficiency in the tax itself.

Secondly, as a corollary, or as a complement to that contention, is the contention that if the statutes were construed to apply to a situation like this where it deals solely with the so-called penalties, it would raise serious constitutional questions.

It would raise, first of all, the question of the denial of the right to jury trial and, second, it would raise [5] the probable unconstitutionality of Rule 32, inverting the burden of proof.

In other words, that as applied to the claim for penalty or for any money claimed solely on the basis of alleged fault, the inverted burden of proof of Rule 32 is unconstitutional.

Now, the facts on which this lie is that for the 10-year period from 1944 or, at the latest, 1945, to 1953 inclusive, the payments were made of taxes and admittedly made in full throughout, but solely on the Forms 1040 and without the filing of any estimated tax returns; and the penalties claimed are for the failure to file the estimated tax returns and for what amount of a cumulative penalty of supposed under-estimation, which is merely a re-

statement of the objection of the failure to file the cumulative tax return.

During that 10-year period the Commissioner never made any objection to the procedure that was followed and, in fact, never made any objection until 1955. Although other objections were made to the returns that were filed, billings were made for amounts claimed to be due in addition to the taxes which were shown; or, in one case, a refund was made. And the errors which the Commissioner made during that period were errors on the side of over-zealousness. In other words, billing for taxes already [6] paid; and that has also continued since the date of 1955, and that on the basis of those facts and other similar facts which we will develop more in detail, the first position is that there was reasonable cause for the non-filing of the deficiency notices.

And it should be remembered that the two years which are in issue here are the years 1952 and 1953. In other words, they are the years following the end of the 10-year period, not the years following at the beginning of the 10-year period.

In addition to that, there is the legal point, first, that if reasonable cause appears for the non-filing, there is no separate penalty for wilful underestimation and, furthermore, we take the position that there is no cumulative penalty for wilful underestimation in any sense.

There are some Tax Court cases which hold that the penalty is cumulative, but the matter has never

gone to a court of appeals, and we make that point for the record in order to preserve the record.

Do you want to make an opening statement now?

Mr. Jones: Yes.

Opening Statement on Behalf of Respondent

Mr. Jones: Your Honor, this case involves the years 1952 and 1953 and, as indicated, deals with penalties under Section 294 (d). [7]

The taxpayer is a lawyer, and during both years earned income from the legal business which was not subject to withholding. It is not in dispute that Petitioner did not file or declare or pay estimated income tax in either of these years. Consequently, the only question is whether he had reasonable cause for failing to do so.

Petitioner adopted the theory that he was under the impression that the law changed in 1944. In view of the various decisions of this Court that a misunderstanding or ignorance of the law does not constitute reasonable cause, the Commissioner has imposed penalties under 294 (a)(1) as well as 294 (d)(2).

In so far as Petitioner questions the jurisdiction of this Court, the answer to that would seem to be that he filed the petition.

Thank you.

Mr. Olshausen: I would like to make, so that the issues will be clear, two corrections.

In the first place, it is not conceded that there was a nonpayment of the estimated tax since there was a non-filing. That much is conceded, but since

the taxes were paid in full, it is not conceded that there was a nonpayment.

In the second place, there is no objection to the jurisdiction of this Court. I don't know whether I should [8] elucidate this point now or later on in the argument. The point is not that this Court has no jurisdiction, but that this Court—the proper decision by this Court in the exercise of its jurisdiction is analagous to that of sustaining a demurrer to a pleading in this case, the pleading although filed before the case gets in this court, the notice being the deficiency notice itself, the point is not that this Court has no jurisdiction but that a deficiency notice states insufficient facts on which to crystallize the liability.

First I will call Mr. Gilmore, who is in court now.

The Court: Very well.

You may come around, sir.

Whereupon,

ROBERT S. GILMORE

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Will you state your name and address for the record, please?

The Witness: Robert S. Gilmore, San Mateo, California.

Direct Examination

Q. (By Mr. Olshausen): Mr. Gilmore, your occupation is a technical advisor to the Department of Internal Revenue? [9]

(Testimony of Robert S. Gilmore.)

A. That's correct.

Q. And how long have you held that position?

A. Since 1949.

Q. And have you been in San Francisco, in the San Francisco Office, during the entire time?

A. Yes.

Q. Now, is it a fact that the—I will withdraw that for the moment.

Were you employed by the Internal Revenue Service before 1949? A. Yes, sir.

Q. And for how long before that?

A. Eight years.

Q. And where had you been employed before you came to San Francisco?

A. I was employed in Montana.

Q. So you have been continuously employed by the United States Department of Internal Revenue since 1941; is that correct? A. That's correct.

Q. Now, is it a fact that the Department of Internal Revenue first began imposing penalties for the non-filing of estimated tax returns on individual income in the year 1950?

A. Not to my knowledge. [10]

Q. Now, what do you mean by that answer, that they did not begin to impose penalties, then, or that they had begun to impose penalties before that?

Mr. Mather: If your Honor please, I will object to that question. This witness hasn't qualified what the internal policy of the Internal Revenue Service was. He has testified that he was located in Montana and in San Francisco. I have no objection to his

(Testimony of Robert S. Gilmore.)

testifying to what he did, but what the policy of the Internal Revenue Service was with respect to national policy, I don't think he has been qualified.

Mr. Olshausen: Well, so far as he knows, of course.

The Court: You may ask him whether or not he knows.

Q. (By Mr. Olshausen): Do you know when the Department of Internal Revenue began to collect penalties for the non-filing of estimated tax returns on individual income taxes? A. No, I do not.

Q. You do not? A. No.

Q. Do you remember that you had a conference with me on the 7th of November 1955?

A. That's correct. [11]

Q. And didn't you tell me then that the Department did not begin to collect penalties for non-filing of estimated tax returns until the year 1950?

A. No, I did not tell you that.

Q. You did not tell me that then?

A. No.

Q. Did the San Francisco Office ever publish an ad in any newspaper stating that from the date on after it was published both estimated and tax returns and forms 1040 would have to be filed?

A. Not to my knowledge.

Q. Did the office ever give a press release to that effect? A. Which office?

Q. The San Francisco Office.

A. Not to my knowledge.

(Testimony of Robert S. Gilmore.)

Q. Did the national office ever give a press release to that effect?

A. I have some recollection that a press release was mentioned in one of the national tax services, either Prentice-Hall or Commerce Clearing House; and, as near as I can recollect, that was sometime during the year 1950 or '51.

Q. And do you remember what the contents of that press release were? [12]

A. Not exactly. I—my only memory is of the general subject. Is that what you wish?

Q. Yes. That's what I am trying to get.

A. The general subject, as I recall, was a notice to taxpayers of the requirements of the law for filing estimated tax and reminder of the penalties in connection therewith.

Q. And that, to your recollection, was published in the year 1950 or 1951?

A. I have no recollection of its publication date. The only thing I remember is the mention that was made in the tax service.

Q. I will reframe the question.

To your recollection, that was mentioned in the tax service in either the year 1950 or the year 1951?

A. That's correct.

Mr. Olshausen: That's all, Mr. Gilmore.

Mr. Mather: No cross examination.

The Court: Very well.

You may stand aside, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. Olshausen: I call Mr. Nickell.

Whereupon,

RICHARD NICKELL

was called as a witness on behalf of the Petitioner and, [13] having been first duly sworn, testified as follows:

The Clerk: Will you give your full name and address, please?

The Witness: Richard Nickell, N-i-c-k-e-l-l, Burlingame, California.

Direct Examination

Q. (By Mr. Olshausen): Mr. Nickell, you are the Assistant District Director of the Internal Revenue Service in San Francisco; is that correct?

A. Yes.

Q. You are now the acting Director?

A. No. I am the Assistant District Director.

Q. Do you know whether a press release was issued from either the local office or the national office in about 1950 or 1951 relating to the necessity of filing both estimated tax returns and forms 1040 on individual income taxes?

Mr. Mather: Counsel, if it would be of any assistance to you, I will stipulate that a press release dated March 13, 1950, was released by Commissioner Shonnaman in which the penalties under Section 294 (d) are reviewed and the escape clause under Section 2924 (d) (2) are discussed.

(Testimony of Richard Nickell.)

Mr. Olshausen: May I see it?

Mr. Mather: No. This isn't it. This is my [14] private paper. I don't have the press release, but I will stipulate, if that's of any assistance to you.

Mr. Olshausen: I will accept the stipulation, but can you give us any——

Q. (By Mr. Olshausen): Are you familiar with the press release which counsel just mentioned?

A. Yes.

Q. Can you give us—do you have copy of it?

A. Yes, I do.

Q. Do you have it here? A. I do.

Q. May I see it?

Mr. Olshausen: I would like to offer this as Petitioner's Exhibit next in order. I imagine that will be No. 2.

Mr. Mather: We have no objection, your Honor, but this is an official document of the Director's office and, as I understand it, it's the only copy they have in their office.

The Court: Well, may we mark it as an exhibit and then allow him to withdraw it and substitute a photostatic copy? Would that be satisfactory?

The Witness: That would be satisfactory.

Mr. Mather: I have no objection, your Honor.

(Petitioner's Exhibit No. 2 was marked for identification.)

The Court: If there is no objection, it will be received in evidence as Petitioner's Exhibit No. 2.

(Testimony of Richard Nickell.)

We were going to mark the 90-day letter as Exhibit No. 1, and you will supply that?

Mr. Olshausen: That's correct, yes.

The Court: This will be Petitioner's Exhibit 2, and I will permit counsel for Respondent to remove that and have it photostated.

Mr. Olshausen: Very well.

The Court: And you can substitute a photostatic copy therefor and return the original to the witness.

Mr. Mather: Very well, your Honor.

(Petitioner's Exhibit No. 2 was received in evidence.)

[See page 46.]

Mr. Olshausen: That's all from this witness.

Mr. Mather: No cross examination.

Mr. Olshausen: I have nothing further. The third witness is dismissed, as far as we are concerned.

(Witness excused.)

The Court: Call your next witness.

Mr. Olshausen: The next witness — I will take the stand myself. [16]

Does the Clerk want to swear me?

The Court: Yes, sir.

Whereupon,

GEORGE OLSHAUSEN

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Court: I take it Mr. Olshausen will testify in narrative form and you will cross examine him after he gets through?

The Witness: Yes. I might say I talked to counsel about this before when the matter was called on the 30th of September, and he said he would not require a question and answer form while I was testifying but he would want to cross examine afterwards.

The Court: Very well.

You may proceed, sir.

Direct Examination

The Witness: My name is George Olshausen. I am the Petitioner in this case. I reside at 1238 Pacific Avenue, San Francisco, California. I am an Attorney at Law, admitted in the courts of California in the year 1926.

By the way, speaking as an Attorney and not as a witness, can we introduce the stipulation of facts now?

Mr. Jones: Yes.

Your Honor, we neglected to introduce this into [17] evidence.

The Court: Very well. You offer in evidence a stipulation?

Mr. Jones: Yes.

(Testimony of George Olshausen.)

The Court: You are offering a stipulation that has been duly signed by both parties?

Mr. Jones: Yes.

The Court: Are there any exhibits attached?

Mr. Jones: No.

The Court: Very well. The stipulation is received in evidence.

The Witness: The stipulation, I believe, states that in the year 1943 I filed both estimated forms and Form 1040; that it was my understanding, and it is my understanding, that the law was changed again in the following year after the first year that estimated tax forms were required to make it optional to file either estimated or Forms 1040. And from the year 1944 or 1945, whichever the first year was there, to and including the year 1953, I filed Forms 1040 every year without filing any estimated tax return, and I received no objections from the Commissioner's Office during that entire 10-year period, until the year 1955, and each of those forms which I filed showed on its face that no estimated tax had been paid.

The Commissioner's Office, however, during that [18] period, made other objections to my tax return.

I have one bill, which I will introduce, for $10.25 for a miscalculation. In one year I received a refund of $300, and from time to time I received tax bills for taxes which had already been paid.

And I might say since this case started, on two

(Testimony of George Olshausen.)

occasions I have received tax bills for taxes already paid.

I have attempted to get the old forms from the Bureau of Documents and have gotten some of them; not all of them.

I will offer in evidence later those which I have.

I never saw the press release which appears in this proceeding as Petitioner's Exhibit 2 before I saw it in the courtroom this morning—this afternoon. Excuse me.

During the whole period, in fact during the entire time that I paid taxes previous to 1955, I always used the instructions pamphlet which accompanies 1044 as a reference pamphlet. That is, whenever anything seemed to require explanation on the face of Form 1040, I went to the reference pamphlet. I did not during that period read the reference pamphlet through from cover to cover every year. I used it like a dictionary.

Now, I want to offer in this connection various documents, some of which the authenticity is covered by the stipulation and others not. [19]

First of all, I want to offer a statement of notice of error in computation for the year 1952 for $10.25 and the check which paid it, dated August 17, 1952. I have mentioned that to counsel, but I haven't shown it to him before.

Mr. Jones: That wasn't in the stipulation.

The Witness: No, because I didn't have it and you said you wanted to wait until you saw it.

Mr. Jones: It is for the year——

(Testimony of George Olshausen.)

The Witness: 1952.

Mr. Jones: For the taxable year '51?

The Witness: Yes. And I want to offer the statement of income tax, too, and the check, as Petitioner's Exhibit 3-A and 3-B.

(Petitioner's Exhibit No. 3-A and 3-B was marked for identification.)

The Court: Any objection, Mr. Jones?

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit 3-A and 3-B—no. You don't have the letters. It would be 3 and 4.

The Witness: Well, I was going to subdivide the exhibit.

The Court: You are going to make it one exhibit?

The Witness: That's right, sir, yes. [20]

The Court: It will be Exhibit 3, Parts A and B.

(Petitioner's Exhibit No. 3-A and 3-B was received in evidence.)

The Witness: Next I want to offer copies of my own income tax returns from 1949 to 1953, both inclusive; and I might say I searched for my old income tax returns and did not find any prior to 1949.

The Court: How many of those are there? How many years?

The Witness: '49 to '53 inclusive.

The Court: And you will introduce those as one exhibit?

(Testimony of George Olshausen.)

The Witness: As one exhibit with subdivisions, yes.

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit No. 4 is received in evidence.

(Petitioner's Exhibit No. 4 was marked for identification and received in evidence.)

The Court: And this Exhibit No. 4 consists of income tax returns filed from 1949 to 1953 inclusive?

The Witness: That's correct, yes.

Next I want to offer the old blanks of—this is covered by the stipulation—the blank forms of 1040 for the years 1943, '44, '45, '46, '47, '48, '49 and '51; in other [21] words, 1943 to '51 inclusive, with the exception of the year 1950.

The Court: I take it there is no objection?

Mr. Jones: There is no objection.

The Court: There being no objection, Petitioner's Exhibit No. 5 is received in evidence.

(Petitioner's Exhibit No. 5 was marked for identification and received in evidence.)

The Witness: Next I want to offer the instruction pamphlet accompanying Form 1040 for the years 1948, 1949, 1950, 1951 and 1952, and I will call attention that I have an instruction pamphlet here that goes back earlier than the earliest Form 1040—no, I withdraw that. I withdraw that last statement.

I have the Forms 1040 back to '43, but these in-

(Testimony of George Olshausen.)

struction pamphlets run from '48 to '51, both inclusive, and they are covered by the stipulation.

The Court: There being no objection, Petitioner's Exhibit No. 6 is received in evidence.

(Petitioner's Exhibit No. 6 was marked for identification and received in evidence.)

The Witness: Next I want to offer my own return for the year 1945 on Form 1040, and since that's beyond the period, I will state the reason for the offer. It is to show that one of the points in the case is that [22] there was no change on the face of Form 1040 relating to the necessity of filing the estimated tax until the new code came in in 1954, and simply to round out the picture and give the Court the possibility of examining the forms both before and after the change in the 1954 code.

I am offering my return for the year 1954.

The Court: No objection?

Mr. Jones: Do you have another copy?

The Witness: No, I don't.

Mr. Jones: That's your copy?

The Witness: That's my copy, yes. But if you have a blank form—I mean I am offering this for the form, not for my form. If you want to introduce a blank, it's all right with me.

Mr. Jones: No. This is all right.

The Court: There being no objection, Petitioner's Exhibit No. 7 is received in evidence.

(Petitioner's Exhibit No. 7 was marked for identification and received in evidence.)

(Testimony of George Olshausen.)

The Witness: Next on the issue that I testified that during the period ending 1953 I was occasionally even billed for taxes already paid. I do not have any of the bills nor the cancelled checks for that period, but I have two of such bills and cancelled checks subsequent to the period, and I offer them in corroboration of the oral testimony which [23] I am not able to corroborate with documents earlier than '53. And this is the bill dated June 11, 1956, for $1,075.21 estimated tax, alleged that the credits only are zero and the cancelled check for the same amount dated January 8, 1956.

Mr. Jones: Your Honor, I object to that on the ground of relevancy. The fact that he was billed for a mistake occurring in 1956 certainly wouldn't prove a mistake occurred in subsequent or prior period.

The Court: I can't see that it would, but I am going to overrule your objection and, for whatever it is worth, I will receive that in evidence.

The Witness: Thank you.

The Court: Petitioner's Exhibit No. 8 will be received in evidence.

(Petitioner's Exhibit No. 8 was marked for identification and received in evidence.)

The Court: I can't see how it will be material, Mr. Olshausen.

The Witness: It is the only documentary corroboration I have of my testimony for the period involved; and this—another case for the same thing, dated May 16 of this year, and the letter of

(Testimony of George Olshausen.)

billing for the subsequent billing for the same tax and a subsequent letter of September 17 of this year after I was billed a second time for the same tax that had already been paid. [24]

Mr. Jones: We make the same objection, your Honor.

The Court: The same ruling. It will be received for whatever it may be worth. I can't see it being material or competent in any way, but if I find that it is, it will be in the record then for my consideration.

Mr. Jones: Do you have a letter included?

The Witness: That's my own letter, yes. I might say that the original of a copy of this letter which is attached to these three documents was mailed to the Commissioner's Office.

The Court: Petitioner's Exhibit No. 9 is received in evidence.

(Petitioner's Exhibit No. 9 was marked for identification and received in evidence.)

The Witness: The next is two letters, one dated March 16, 1957, and the other one dated April 12, 1957, from the U. S. Treasury Department in Washington, signed K. W. Johnson, Public Information Division, in response to my request for old forms. And I might say that I told counsel about only the second one of these, but that was by inadvertence. They both relate to the same thing.

Mr. Jones: That's what we——

The Witness: The second one is stipulated. The

(Testimony of George Olshausen.)

first one I did not have when we drew up the stipulation.

The Court: There is no objection? [25]

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit No. 10 is received in evidence.

(Petitioner's Exhibit No. 10 was marked for identification and received in evidence.)

[See page 49.]

The Court: Anything further?

The Witness: Yes.

In my conference with Mr. Gilmore, which I wrote up in the form of a memorandum immediately after it occurred and which appears as an appendix to the petition, he did make the statement that the Department had not begun to impose or collect penalties for the non-filing of estimated tax returns until the year 1950, and he made the additional statement that by that time they felt that the taxpayers should be acquainted with the new law and so that it was proper to collect penalties from them.

That is my direct testimony.

Cross Examination

Q. (By Mr. Jones): Mr. Olshausen, we also stipulated that you prepared your own income tax returns for all the periods involved?

A. Correct, yes.

Q. Further that in two years you computed your income and took advantage of the provisions of 107?

(Testimony of George Olshausen.)

A. That's correct. In other words, I have not [26] included the stipulation in my direct testimony, but the stipulation is all correct, yes.

Q. For the purposes of further questioning?

A. Yes.

Q. How did you find out how to use or how to compute income under 107?

A. I don't remember that. I think I got it from conversations with other lawyers. In other words, lawyers have contingent cases and I have quite a few contingent cases in the course of my practice, and many of the other lawyers whom I know have the same thing. And, as far as I remember, it came up in conversation that when you have a contingent case which carries on for several years and you get paid at the end of it, you can apportion your fee back to when it started.

Q. But when you prepared your return, how did you find out the exact amount of time involved and exactly how you do it?

A. Well, I just did it by splitting the years. In other words, that first case in which I used it was with a case that went ten years. So I divided it by a 10-year period.

Q. You made no effort to find out how long that—what period 107 covered, how far you could spread back from the—— [27]

A. As far as I remember, I did—the limitation was only the other way, that there had to be a minimum of 36 months.

Q. How did you find that out?

(Testimony of George Olshausen.)

A. I don't remember whether I looked it up or whether some other lawyer mentioned it to me.

Q. You declared and paid estimated income tax in 1943; is that correct?

A. As far as I remember, there was one year. Whether it was '43 or '44 I am not sure. I did in one year, and then again I didn't do it.

Q. You spoke that you were under the impression that the year after you did this, you believed that it was optional whether you——

A. That's correct, yes.

Q. Upon what basis did you reach that decision?

A. I don't remember where I heard that. All I know is that I heard it because I had changed and I changed again. Then I continued the same year—the same way for the next ten years.

Q. Do you recall investigating the law?

A. No. I mean I recall I did not investigate the law. I filed it that way and received no objection, so I continued to file it that way.

Q. Did you look at the reference book, the little [28] manual that goes along?

A. I don't remember. I couldn't say whether I did or not in the year 1944.

Q. Did you ever look at it?

A. Oh, yes. As I say, I looked at the—during the whole period I have always looked at the reference book when there was anything on the face of the Form 1040 which seemed to require explanation.

(Testimony of George Olshausen.)

Q. You wouldn't look in the reference book in the event you were going to change from the declaring and paying from one year to not declaring and paying in the next year? You wouldn't look that up?

A. I can't say. I do know this: This is included in the exhibits which have been introduced; that the reference books before 1950 do not say that you have to file both forms.

Q. You have spoken about various billings that you received prior to the years 1952 and 1953. Were you ever contacted by an Internal Revenue Agent during that period?

A. No. I just got bills in the mail and I paid them. As I say, on one occasion I got a refund in the mail.

Q. Do you know whether most of those were mathematical adjustments? A. I think so, yes.

Q. In connection with this press release which you [29] sought to obtain, did you go down to the library and try to find out if they had a copy of it?

A. No. I didn't even know what it was. In fact, I understood it was a newspaper ad.

Q. Did you go to the library and investigate?

A. No. I didn't even know what year it was.

Q. You didn't go to an index or anything?

A. I might say I never heard of that until my conference with Mr. Barkley in the Fall of 1955.

Q. Two years ago?

A. That was after this case came up, yes.

(Testimony of George Olshausen.)

Q. It was approximately two years prior to trial? A. To trial, yes.

Mr. Jones: That's all.

The Witness: That's our case now. Of course, I assume it is to be briefed, as far as the evidence goes.

The Court: You may stand aside.

(Witness excused.)

Mr. Jones: We have no additional evidence.

The Court: The Respondent rests.

Mr. Jones: Yes.

The Court: The Petitioner rests?

Mr. Olshausen: Yes.

The Court: Very well. How much time will you want for filing your original brief, Mr. Olshausen?

Mr. Olshausen: Well, I am in the middle of another brief now. If I could have 30 days I think I can get it in.

The Court: Well, you have at least 45.

Mr. Olshausen: Oh, well, then, I am as good as certain I can get it in 45 days.

The Court: I will give you the exact date on which it is due.

What would 45 days file on?

The Clerk: Make that November 18, Monday.

The Court: Very well. Petitioner will file his original brief on or before November 18.

Mr. Olshausen: And if I should need an extension on that, I assume I will be able to get it?

The Court: Yes. Before the date arrives, you send in a written application to Washington ask-

ing for an extension of time, if you find that it is impossible to get your brief in.

Mr. Olshausen: That's November 18, that date?

The Court: November 18.

And 30 days from that date would be what, Mr. Clerk?

The Clerk: Make that December 18.

The Court: Respondent will file answer brief on or before December 18. [31]

20 days from that date would be what date now? Well, that would make it about January 18.

Your reply brief, Mr. Olshausen, will be filed on or before January 8, 1957.

Mr. Olshausen: Now, there is just one thing. Will these exhibits remain in San Francisco? I am going to need the exhibits to write the brief.

The Court: No.

Will you gentlemen need them for your brief also?

Mr. Mather: No, your Honor. We won't need them.

The Court: If someone will undertake to return those just as rapidly as possible, I wouldn't object to the Clerk leaving them with you. You tell the Clerk what exhibits you desire to keep.

Mr. Olshausen: I think I will need all of them.

The Court: Give him your receipt for them and return them to Washington just as soon as you are through—at the earliest possible moment.

Mr. Olshausen: Yes.

The Court: Is there anything further in connection with this case?

Mr. Jones: No, your Honor.

The Court: Very well. If there is nothing further, we will be recessed until 2:00 o'clock tomorrow [32] afternoon.

(Whereupon, at 2:50 o'clock p.m., Thursday, October 3, 1957, the hearing in the above-entitled matter was closed.) [33]

[Endorsed]: T.C.U.S. Filed October 15, 1957.

PETITIONER'S EXHIBIT No. 2

Treasury Department
Information Service
Washington 25, D.C.

Encl. to Mim., Coll. No. 6506 S-2286
Immediate Release,
Monday, March 13, 1950.

George J. Schoeneman, Commissioner of Internal Revenue, today called the attention of taxpayers to the importance of filing Declarations of Estimated Tax for 1950, as well as filing income tax returns for 1949, by March 15. Declarations are due on that date from several million persons.

The Bureau of Internal Revenue is required by law to give application to the statutory penalties for failure to file a declaration on time, for failure to make required payments, and for substantial underestimation of tax.

The Declaration of Estimated Tax, filed on Form

Petitioner's Exhibit No. 2—(Continued)

1040ES, is part of the pay-as-you-go system of tax collection which was inaugurated by law in 1943. In the case of most wage-earners, sufficient tax is withheld from wages to keep such persons substantially paid up on their income taxes. However, many taxpayers are not subject to withholding, or their withholding is insufficient to pay their taxes, and the Declaration of Estimated Tax is a means of keeping them substantially current on their income tax payments.

Generally, declarations must be filed by business and professional people, investors, landlords, and other taxpayers who expect to get over $600 income of which at least $100 is from sources not subject to withholding during 1950, and also by wage-earners who—even though subject to withholding— expect to earn this year more than $4,500 plus $600 for each of their exemptions (for example, $5,100 in the case of a single man with no dependents, $5,700 in the case of a married man with a wife and no dependents, etc.).

Commissioner Schoeneman pointed out that no taxpayer, subject to filing a Declaration, can avoid this responsibility on the ground that it may be difficult to estimate income and tax in advance. The Commissioner advised such persons that the law provides them with ample opportunity to correct their estimates at later dates, but does not excuse the failure to make as good an estimate as the taxpayer can reasonably be expected to make.

Petitioner's Exhibit No. 2—(Continued)

He explained that a Declaration filed on March 15 can be amended, if the taxpayer desires, on June 15, or on September 15, or even as late as January 15, 1951. Even then, a taxpayer will not be penalized if his estimate does not fall short of the correct tax by more than 20 per cent.

Nor will any penalty be applied if a taxpayer bases his estimate on last year's income and figures his tax on this year's rates and exemptions.

Although farmers are required to file declarations, they are allowed by a special law to postpone filing declaration until January 15 of the following year, and need not file a declaration at all if they file their final income tax returns by January 31.

The penalty for failing to file on time or to make payments on time, in the case of declarations, is 5 per cent of the unpaid tax which is due, plus 1 per cent for each month of delay, but the overall penalty for this cause cannot exceed 10 per cent of tax.

The penalty for underestimating by more than 20 per cent (33⅓ per cent in the case of farmers) is 6 per cent of the difference between the estimated and the correct tax.

Taxpayers needing forms or information in connection with Declarations of Estimated Tax are invited to consult the nearest office of a Collector of Internal Revenue.

Admitted in Evidence October 3, 1957.

PETITIONER'S EXHIBIT No. 10

U. S. Treasury Department
Washington 25

March 6, 1957

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue, Washington 25, D. C. and Refer to C:I.

Mr. George Olshausen
1238 Pacific Avenue
San Francisco 9, California

Dear Mr. Olshausen:

Your letter dated January 28, 1957 addressed to the Government Printing Office was referred to us for reply. You ask for Forms 1040 for 1943 to 1948 inclusive.

It is indeed regretted that your letter has been handled so many times. However, for future guidance may we submit that internal revenue forms are neither sold or distributed by the Government Printing Office. Naturally they sent your letter to the District Director in San Francisco, California not knowing that supplies of out dated returns are not stocked by our field offices, nor, here in Washington.

Forms 1040 for years on which the statute of limitations has ordinarily run are not stocked. However, we have a return for each year, 1943, 1944, 1947, 1948. They are enclosed.

It is not known by us where you might obtain re-

Petitioner's Exhibit No. 10—(Continued)

turns for 1945 and 1946. There are none available here.

We hope the enclosed returns will serve you some useful purpose and we are pleased to be of this service to you.

Very truly yours,

/s/ K. W. JOHNSON,
K. W. Johnson,
Public Information Division.

[Stamped]: Received—Taxed Court of the United States, 1957, Dec. 16, P.M. 3:30.

U. S. Treasury Department
Washington 25

April 12, 1957

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue, Washington 25, D. C. and Refer to C:I.

Mr. George Olshausen
1238 Pacific Avenue
San Francisco 9, California

Dear Mr. Olshausen:

It is regretted that we do not have a stock of instructions for individual income tax returns which were to be filed for the years 1943-1948. This applies also to the older forms themselves.

As a special favor we managed to scare up single returns which were sent you under date of March

Petitioner's Exhibit No. 10—(Continued)

6, 1957. It is doubtful if we could repeat.

We would like to make it clear that not all outdated forms and instructions are destroyed. However, you will understand how impossible it would be to stock a supply of returns not actually needed by the taxpaying public. The Archives and Library of Congress of course keep samples for those doing research work. One of your local libraries may also have them for this purpose. In most instances our supply just runs out and there is no necessity for reprinting.

This is in reply to your letter dated April 9, 1957.

Very truly yours,

/s/ K. W. JOHNSON,
K. W. Johnson,
Public Information Division.

[Stamped]: Received—Tax Court of the United States, 1957, Dec. 16, P.M. 3:30.

Admitted in Evidence October 3, 1957.

T. C. Memo. 1958-85

Tax Court of the United States

George Olshausen, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 61127. Filed May 13, 1958.

George Olshausen, pro se.

Leslie T. Jones, Jr., Esq., and T. M. Mather, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in additions to the tax under section 294 of the Internal Revenue Code of 1939 for each of the years 1952 and 1953, as follows:

		Additions to the tax under	
Year	Deficiency	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1952	—	$734.84	$489.92
1953	—	114.73	76.50

The issues are: (1) Whether the respondent may proceed by notice of deficiency where the determination involves only additions to the tax; (2) whether such proceeding violates the Fifth and Seventh Amendments to the Constitution; (3) whether the respondent is barred by laches; (4) whether the respondent erred in determining that the failure to file a declaration of estimated tax was not due to reasonable cause; and, (5) whether the respondent properly determined additions to the tax for substantial understatement of estimated tax.

Findings of Fact

Some facts have been stipulated and are found accordingly.

Petitioner is an individual residing at 1238 Pacific Avenue, San Francisco, California. His returns for the taxable years involved were filed with the director of internal revenue for the district of San Francisco, California.

Petitioner is an attorney and has practiced in the courts of California since 1926.

During the taxable years in question the petitioner did not file a declaration of estimated tax.

Petitioner filed a declaration of estimated tax in either 1943 or 1944. Under the belief the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive.

On January 15th of each year petitioner regularly filed Form 1040 and paid the tax shown to be due. Petitioner stated he was under the impression that the filing of a declaration of estimated tax was optional if Form 1040 was filed on January 15th. Petitioner was unable to recall how he gained the impression a declaration was unnecessary. Petitioner made no investigation of the law.

During the period 1945 to 1953, inclusive, the returns filed on Form 1040 by the petitioner disclosed his failure to file the declarations of estimated tax.

During the period between 1944 and 1953, petitioner received a refund and was billed for additional amounts due. During such period petitioner was not contacted by the Internal Revenue Service

and believes the adjustments referred to were mathematical.

In each of the years 1946 and 1950, petitioner reported income apportioned under section 107 of the 1939 Code. Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section.

In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to section 294 of the Code. Petitioner was unaware of such release until it was called to his attention at a conference with revenue agents which occurred in the fall of 1955.

In the deficiency notice, the respondent made the following explanation:

You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

Petitioner's failure to file declarations of esti-

mated tax for the taxable years 1952 and 1953 was not due to reasonable cause.

Opinion

LeMire, Judge: The respondent determined additions to the tax under section 294 of the internal Revenue Code of 1939 against petitioner for each of the taxable years 1952 and 1953.

The amounts of the additions to the tax determined by the respondent are not in dispute. Petitioner makes no claim that he filed a declaration of estimated tax in the taxable years involved.

Petitioner is a lawyer appearing pro se. His primary contention is that the respondent is not authorized to proceed by notice of deficiency where only additions to the tax are determined, and the notice here in question is not a notice of deficiency within the definition of section 271 of the Code. We find no merit in such contention. It is well settled that a notice involving merely additions to the tax under section 294 is a deficiency notice under section 271, and that the filing of a petition with this Court confers jurisdiction. Herbert Eck, 16 T.C. 511, affd. 202 F. 2d 750, certiorari denied 346 U.S. 822; E. C. Newsom, 22 T.C. 225, affd. per curiam 219 F. 2d 444; Union Telephone Co., 41 B.T.A. 152; Ely & Walker Dry Goods Co. v. United States, 34 F. 2d 429; certiorari denied 281 U.S. 755; Charles E. Myers, Sr., 28 T.C. 12.

The petitioner further argues that to uphold the respondent's right to proceed by deficiency notice

deprives him of the right to a jury trial under the Seventh Amendment, and violates the due process clause under the Fifth Amendment to the Constitution.

The constitutionality of sections 58 and 294 here involved has recently been considered and upheld. Erwin v. Granquist, F. 2d (Feb. 13, 1958) certiorari applied for. The Seventh Amendment, relating to a jury trial, applies only to actions at law and not to statutory proceedings. Wichwire v. Reinecke, 275 U.S. 101. Petitioner could pay the tax, sue for refund, and thus have a jury trial. We find no merit in either of petitioner's contentions. The defense of laches is equally without merit. The Supreme Court in a number of cases has held that the United States is not subject to the defense of laches, if any here exist. United States v. Summerlin, 310 U.S. 414, 416 (citing authorities).

The issue whether the petitioner's failure to meet the requirements of section 58 was due to reasonable cause and not to wilful neglect presents a factual questions to be resolved upon the merits.

Section 294(d)(1)(A) imposes the duty upon the Commissioner to determine, in the first instance, whether or not the failure to file a declaration of estimated tax is due to reasonable cause. Such a determination was made and is prima facie correct. The burden is upon the petitioner to establish that the failure was due to reasonable cause. Wickwire v. Reinecke, supra; Welch vs. Helvering, 290 U.S. 111.

Reasonable cause is defined as the "exercise of

ordinary business care and prudence." In re Fisk's Estate, 203 F. 2d 358. Petitioner contends that the evidence in the instant case brings him within that definition.

As justification for his failure to file the declarations, petitioner contends that no one connected with the revenue service ever called his attention to the necessity of filing declarations, although his regular returns filed on Form 1040 clearly disclose that he had not filed any declarations. Ignorance of the law is no excuse. The record, however, shows that petitioner was familiar with the requirements of the law since in either 1943 or 1944 he did file such a declaration.

Petitioner testified that he gained the impression that there had been a change in the policy of the Internal Revenue Service not to require a declaration where Form 1040 was filed by January 15th. Petitioner could not recall where he gained such impression.

As an additional excuse, petitioner testified that Form 1040 made no reference to the necessity to file a declaration and since the questions pertaining to withholding on Form 1040 were not changed over the years, he did not examine the instruction pamphlet.

Petitioner could not rely upon the failure of the revenue service to call his omission to his attention. This record persuades us that petitioner did not use reasonable diligence in ascertaining his duty to comply with the law. Any reasonable and prudent person would not rely upon an impression, but

would consult the current law. Neither indifference nor reliance upon rumor constitute reasonable cause. Howard M. Fischer, 25 T.C. 102; Harold C. Marbut, 28 T.C. 687; Charles M. Kilborn, 29 T.C. 102 (on appeal C.A.-5).

Upon the entire record we are of the opinion that petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause and we have so found as a fact.

Finally, petitioner contends that since he filed no declarations of estimated tax, the additions to the tax under section 294(d)(2) cannot be sustained. A number of District Court decisions support the petitioner.[1]

This Court has consistently held that the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) are cumulative. G. E. Fuller, 20 T.C. 308; H. R. Smith, 20 T.C. 663; Harry Hartley, 23 T.C. 353; Clark v. Commissioner, ... F. 2d .... (Mar. 13, 1958) affirming a memorandum opinion of this Court. See also, Peterson v. United States, 141 F. Supp. 382; Furrow v. United States, 150 F. Supp. 581; Palmisano v. United States, 159 F. Supp. 98.

The respondent's determination as to the additions to the tax under sections 294(d)(1)(A) and

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[1] United States v. Ridley, 120 F. Supp. 530; Jones v. Wood, 151 F. Supp. 678; Owens v. United States, 134 F. Supp. 31; Powell v. Granquist, 146 F. Supp. 308; Stengle v. United States, 150 F. Supp. 364; Barnwell v. United States, ..., F. Supp. .... (Feb. 4, 1958).

294(d)(2) for each of the taxable years 1952 and 1953 is sustained.

Decision will be entered for the respondent.

Served May 13, 1958.

The Tax Court of the United States
Washington

Docket No. 61127

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed May 13, 1958, it is

Ordered and Decided: That there are additions to the tax under sections 294(d)(1)(A) and 294 (d)(2), for the years 1952 and 1953, as follows:

	Additions to the tax under	
Year	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1952	$734.84	$489.92
1953	114.73	76.50

Entered May 15, 1958.

[Seal] /s/ C. P. LeMIRE,
Judge.

Served May 16, 1958.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petitioner hereby files its petition for review of the decision of the Tax Court of the United States under the provisions of Section 1142 of the Internal Revenue Code of 1939, as continued in effect by Section 7851(b)(1) of the Internal Revenue Code of 1954.

I.

The facts relating to same are as follows:

Petitioner is and was at all times herein mentioned an individual, a resident of the City and County of San Francisco, State of California.

The notice of deficiency issued by the Collector of Internal Revenue was issued from the Office of the San Francisco District Director of Internal Revenue.

The hearing before the Tax Court whose decision is sought to be reviewed was held in San Francisco, California.

II.

The nature of the controversy and the contentions of the parties are as follows:

Respondent, Commissioner of Internal Revenue imposed on petitioner "additions" to the income tax for the years 1952 and 1953 for non-filing of estimated tax returns for those years, which non-filing the Tax Court has found to be due to "wilful neglect" and not to "reasonable cause." Said addi-

tions were imposed for both years both under sections 294 (d)(1)(A) and 294 (d)(2) of the Internal Revenue Code of 1939. The deficiency notice refers to these additions as "penalties". There is no claim of any nonpayment or underpayment of tax.

In 1952 and 1953 petitioner filed Form 1040 and paid taxes in accordance with Form 1040 without filing any estimated tax returns; he had done so each year since 1944 or 1945. Each year since 1944 or 1945 it appeared on the face of petitioner's Form 1040 returns that no estimated tax return had been filed.

During these years the Commissioner of Internal Revenue notified petitioner of mistakes in calculation in his returns either billing him for additional tax or (on one occasion) sending a refund, but at no time prior to the fall of 1955 did respondent raise any objection to the non-filing of estimated tax returns.

The Commissioner issued a deficiency notice for these "additions" alone (not claiming any deficiency in the tax itself) claiming cumulative "additions" (or "penalties", in the language of the deficiency notice) both for non-filing of estimated tax returns under section 294(d)(1)(A) and for alleged "substantial underestimation" under section 294(d)(2).

The Tax Court rendered decision for the respondent, holding as follows either expressly or by implication:

(1) That the procedure of a deficiency notice

may be used to enforce claims for the "additions" ("penalties") to the tax provided by section 294 of the Internal Revenue Code of 1939, even where there is no claim of any deficiency in the tax itself.

(2) Such procedure is constitutional as applied, and was not a denial of jury trial or of due process of law.

(3) That after seven or eight years during which the collector has without objection accepted taxes paid under Form 1040, it is "wilful neglect" to continue to follow the same procedure, particularly where no instructions pamphlet prior to the one for 1950 stated that both forms had to be filed, and in view of the facts that there was no change in form 1040, and the statement requiring in the 1950 pamphlet was in ordinary type in the middle of an inside page.

(4) That the inverted burden of proof established by Rule 32 of the Tax Court applies to claims for the "additions" provided for by section 294 of the Internal Revenue Code, even where there is no claim of any deficiency in the tax itself; that such inverted burden of proof is constitutional as applied to such additions ("penalties").

(5) That the additions provided by 1939 Code section 294(d)(1)(A) and those provided by 1939 Code section 294(d)(2) are cumulative, and may both be imposed for the same omission.

(6) That respondent's claim was not barred by

laches even though respondent had because of lapse of time destroyed evidence relevant to the issues.

(7) The Tax Court ignored the argument that the respondent cannot increase its claim by its own delay, and was therefore in any event limited to the amount which it could have recovered had it acted promptly, to wit: $48.97 (an argument not contested by attorneys for respondent); by affirming it in effect overruled this contention.

(8) Records which had been destroyed by respondent, as too old included instructions pamphlets accompanying forms 1040. At the trial the earliest produced was the one for 1949, offered by plaintiff. After the decision (but before the decision reached San Francisco) petitioner found a copy of the instructions pamphlet for 1948 and moved to reopen the proof to admit this 1948 instructions pamphlet; on May 29, 1958 the Tax Court denied this motion on the ground that the 1948 instructions pamphlet was supposedly "cumulative" to the instructions pamphlets for other years which were already in evidence.

Petitioner's contentions on the above mentioned points are respectively as follows:

(1) That the literal meaning of sections 294 and 271 and 272, of the Internal Revenue Code of 1939 (re-enacted in the Code of 1954) does not extend the deficiency-notice procedure to claims for "additions" under section 294 where there is no claim of deficiency in the tax itself; that such literal construction avoids constitutional issues;

(2) that any other construction of said sections 271, 272 and 294 of the Internal Code of 1939 would be a violation of the petitioner's constitutional rights in that it would deny a jury trial in violation of the VIIth (or perhaps the VIth) Amendment to the United States Constitution in denying a jury upon the trial of a claim for money based upon alleged fault; and that application of the inverted burden of proof under Rule 32 of the Tax Court applied to such a claim deprives petitioner of property without due process of law in violation of the Vth Amendment to the United States Constitution;

(3) that under the authorities "wilful neglect" requires a "bad purpose"; that upon the present record as a matter of law no "wilful neglect" is shown in the non-filing of estimated tax returns in the two final years of an eight-year period; that the Tax Court's finding to the contrary was unsupported by evidence and capricious; that its legal conclusion to the contrary was not supported by its own findings of probative facts and therefore capricious (Helms Bakery v. C.I.R., 236 F 2d 3);

(4) that, in any event, petitioner was denied due process of law in violation of the Vth Amendment to the United States Constitution in that the Tax Court measured the evidence on the present claim according to the inverted burden of proof provided for in Tax Court Rule 32;

(5) that the subdivisions of section 294 of the Internal Revenue Code of 1939 are not cumulative,

and section 294(d)(2) does not apply at all to the non-filing of an estimated tax return;

(6) that the forms 1040 and accompanying instructions pamphlets for years preceding 1952 are relevant to the issue of "good cause" versus "wilful neglect"; that after having destroyed these documents as too old, the respondent denied due process of law to petitioner in violation of the Vth Amendment to the United States Constitution in pressing a claim on which it had destroyed relevant evidence; that for the same reasons respondent was guilty of laches which upon these facts operates against the government;

(7) that respondent cannot consistently with due process of law under the Vth Amendment to the United States Constitution, increase its claim by its own delay, and it is limited at most to the amount which it could have recovered if it had acted immediately, to-wit, $48.97.

III.

The petitioner being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court, and by its decision entered herein, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE OLSHAUSEN,
Petitioner.

[Title of Tax Court and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

Petitioner intends to Rely upon all the Points mentioned in the Petition for Review, particularly on the following:

1. Neither the provisions of the Internal Revenue Code of 1939 (of which sections 271, 272, 294 are the relevant sections) nor the provisions of the Internal Revenue Code of 1954 (of which section 6212 is the relevant procedural section) make the deficiency notice procedure applicable to the "additions" ("penalties") under section 294 of the 1939 Code when such "additions" are not coupled with any tax deficiency.

2. Any other construction would raise serious constitutional questions; in particular that petitioner was thereby denied a jury trial in violation of the VIIth Amendment if the "additions" ("penalties") under section 294 are civil or in violation of the VIth Amendment if the "additions" ("penalties") are considered criminal; and that petitioner was denied due process of law in violation of the Vth Amendment by application of the inverted burden of proof to the present state of facts under the provisions of Rule 32 of the Tax Court; and was denied due process of law in that the original finding of fault underlying imposition of "additions" ("penalties") was made by executive officer who has responsibility of collecting revenue; any other con-

struction would in fact violate the above constitutional provisions as to petitioner.

3. The evidence, as a matter of law, does not show wilful neglect, but on the contrary shows reasonable cause for non-filing of estimated tax returns for the years 1952 and 1953, and the Tax Court's finding to the contrary is arbitrary and capricious.

In this connection the following finding of the Tax Court shows a misreading of the testimony:

> "In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040."

The testimony is that reference to the instructions pamphlet was made whenever Form 1040 seemed to require further elucidation, not merely when Form 1040 referred to the instructions pamphlet. Besides, the instructions pamphlet always (not "usually") accompanied Form 1040.

4. The Tax Court's legal conclusion of "wilful neglect" and failure to show reasonable cause is unsupported by its findings of probative facts.

5. The provisions of section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all.

6. The government having heretofore destroyed as too old, evidence which is relevant to the issues of this case deprives petitioner of due process of law

by now pressing the claim; for which reason the government is barred by laches.

7. The government cannot, consistently with due process increase its claim by its own delay; hence it is at most limited to what it might have recovered, if it had acted promptly, to-wit, $48.97.

8. The Instructions Pamphlet for the year 1948 was relevant to the issues and not cumulative to the instructions pamphlet for other years; hence its exclusion was error.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed August 6, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers on file in my office as called for by the Designation of Contents of Record, including Petitioner's Exhibits 1, 2, 3-a, 3-b, 4 thru 10, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket

entries in said Tax Court case, as the same appear in the official docket of my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of September, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the United States.

[Endorsed]: No. 16183. United States Court of Appeals For the Ninth Circuit. George Olshausen, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: September 12, 1958.

Docketed: September 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16183

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DESIGNATION OF RECORD AND STATEMENT OF POINTS ON PETITION FOR REVIEW

Petitioner hereby adopts the Designation of Contents of Record on Review, Supplemental Designation of Contents Of Record on Review and Statement of Points to be relied on on Review all heretofore filed with the Tax Court in the above entitled matter (Tax Court Docket No. 61127) and transmitted to this Court as part of the Tax Court Record.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 22, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by counsel for the respective parties herein that, subject to the approval of the Court, and notwithstanding any previous designations for printing, that only the following items be included in the printed record in the above-entitled case:

1. Petition and Exhibit A

2. Answer

3. First, Second and Third Amendments to Petition

4. Answers to First, Second and Third Amendments

5. Conditional Demand for Jury Trial—Denied

6. Stipulation of Facts

7. Transcript of Testimony

8. Petitioner's Exhibits 2 and 10

9. Tax Court Memorandum Findings of Fact and Opinion

10. Tax Court Decision

* * * * *

13. Petition for Review with Statement of Points

14. This Stipulation.

It is further stipulated that this Court and counsel may refer in its opinion, or in their briefs, and

on oral argument to any item in its original state which had previously been designated for printing by counsel for the petitioner and which has been omitted by this stipulation from the printed record with the same force and effect as if it had been printed.

Dated: October 23, 1958.

/s/ GEORGE OLSHAUSEN,
Counsel for the Petitioner.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Counsel for the Respondent.

[Endorsed]: Filed November 7, 1958. Paul P. O'Brien, Clerk.